89-1030

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

vs.

JAMES G. LEDBETTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Volume 2 of 2
Appendix

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Joy D. WEHUNT, Plaintiff,

v.

James G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources and Louis Sullivan, Defendants-Appellees.

Gwendolyn Brown,
Intervenor-Appellant.

No. 87-8345.

United States Court of Appeals,
Eleventh Circuit.

June 27, 1989.

AFDC recipients brought suit seeking to require the State of Georgia and the Department of Health and Human Services to administer and enforce the child support provisions of the Social Security Act. The United States District Court for the Northern District of Georgia, No. C85-2891A, J. Owen Forrester J., granted motion to dismiss, and one recipient appealed. The Court of Appeals held that: (1) child support provisions of the Social Security Act do not create rights enforceable in a private suit by an AFDC recipient, and

(2) recipient lacked standing to challenge administration of child support provisions by the Secretary of Health and Human Services.

Affirmed.

Clark, Circuit Judge, filed a dissenting opinion.

1. Civil Rights 13.3(1)

Section 1983 does not encompass claims based on statutory violations if Congress has foreclosed private enforcement in enactment of the statute, or Congress has not created enforceable rights in the relevant statutory provisions. 42 U.S.C.A. § 1983.

2. Social Security and Public Welfare 194.21

Child support provisions of Title IV-D of the Social Security Act did not create rights which AFDC beneficiaries may enforce by means of a private cause of action;

provisions were not enacted for the "especial benefit" of AFDC families, but to recover welfare payments and to reduce the welfare rolls by establishing and enforcing support obligations. Social Security Act, § 451 et seq., as amended, 42 U.S.C.A. § 651 et seq.

3. Administrative Law and Procedure 666

In order to have standing to sue under the Administrative Procedure Act, plaintiffs must be injured in fact, and interest sought to be protected must be arguably within "zone of interests" to be protected or regulated by the statute. 5 U.S.C.A. § 701 et seq.

4. Federal Civil Procedure 103.2

Doctrine of Article III standing requires that plaintiff allege some actual or threatened injury that is fairly traceable to defendant and can be remedied by an

order directed against defendant. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Social Security and Public Welfare 194.21

AFDC recipient lacked standing to challenge the Secretary of Health and Human Services' administration of child support provisions of the Social Security Act, as they related to the State of Georgia; injuries alleged by recipient, loss of $50 in child support and failure to establish her child's paternity, were caused directly by absent father, and nexus between injuries and the Secretary was attenuated at best, as it was far from certain that withholding of funds would result in more vigorous enforcement of Georgia child support laws. Social Security Act, § 451 et seq., as amended, 42 U.S.C.A. § 651 et seq., U.S.C.A. Const. Art. 3, § 1 et seq.

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Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and CLARK, Circuit Judges, and GUIN*, District Judge.

Appeal from the United States District Court for the Northern District of Georgia.

PER CURIAM:

Presently before the court is a challenge to the program established under the Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 651 et seq. (1982 & Supp., III 1985), by recipients of its benefits. The challenge seeks to require the State of Georgia and the Department of Health & Human Services to administer and enforce the provisions of Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq. (hereinafter The Act). In separate orders, the district court dismissed the plaintiffs' various claims. For the

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* Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

reasons which follow, we affirm the district court.

Background

A. The Statutory Framework

The AFDC program, also known as Title IV-A of The Act, is a federal-state welfare program for poor families deprived of support of one parent due to that parent's absence, death, or incapacity. 42 U.S.C. § 601 et seq. States administer program benefits in accordance with federal requirements, and the Department of Health & Human Services (HHS), which is responsible for program oversight,[1]

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[1] 42 U.S.C. § 602(b)-(c). Section 602(a) requires that the States must establish a plan for aid and services to needy families with children and that the plan be mandatory upon all political subdivisions of the state. Section (b) pertains to approval of the state plans by the Secretary of HHS [hereinafter Secretary], and section (c) deals with the Secretary's duties pertaining to the compilation of data, publishing of findings, and reports to Congress.

withholds or reduces federal matching funds if a state fails to comply with those requirements.[2]

In 1975 Congress amended The Act to require a state operating an AFDC program to establish a separate child support enforcement unit to serve both AFDC and non-AFDC families.[3] Pub.L. 93-647, § 101(d)(5)(c) et seq., 88 Stat. 2351 (1975) (codified at 42 U.S.C. § 602(27)). The law made provision to locate absent parents, establish paternity and support obligations on behalf of children in need of those services, and enforce child support obligations assigned to the enforcement unit.[4] In 1984 Congress passed the Child Support Enforcement Amendments,

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2 42 U.S.C. § 604. Deviation from plan.

3 Title IV-D of The Act.

4 42 U.S.C. §654(4), (6), (9).

Pub.L. 98-378, 98 Stat. 1305, by which states were to implement the child support enforcement mechanisms specifically enumerated in the statute to "increase the effectiveness" of the programs administered by the states. The states are required to create a system of wage withholding which can automatically recover child support and arrearages. 42 U.S.C. § 666(a)(1), (8) and § 666(b). Procedures by which the state child support enforcement agency and the state shall provide for enforcing a support order follow: require the parent to post security or a bond;[5] impose liens on real or personal property;[6] withhold the amount of an arrearage from tax returns;[7] and,

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5 42 U.S.C. § 666(a)(6)

6 42 U.S.C. § 666(a)(4).

7 42 U.S.C. § 666(a)(3).

report significant arrearages to credit reporting agencies.[8]

The AFDC program is a contractual arrangement by which the federal government and the states work together. The program is funded by both, with the federal government making payments to the states by set formula. [9] The Secretary is empowered to evaluate the implementation of state programs and conduct audits of the plans to assure conformity with the requirements.[10] If the evaluation and audit show nonconformity, the Secretary must reduce or suspend payment to the noncomplying state until such time as the state program is found to be in substantial compliance.[11]

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8 42 U.S.C. § 666(a)(7).

9 42 U.S.C. § 603.

10 42 U.S.C. § 652(a)(4).

11 42 U.S.C. § 603(h).

As a condition for receiving AFDC benefits, an applicant must assign to the state any support rights the family has and must cooperate with the state agency's efforts to establish paternity and collect support unless such cooperation is against the best interests of the child.[12] Except for the first fifty dollars of child support collected each month, which is paid to the family and does not affect the family's AFDC eligibility or decrease any amount otherwise payable as assistance to such family, the state retains support collections to held offset welfare expenditures on the family's behalf.[13] If a support collection exceeds the family's AFDC grant, "the State will determine if such collection, when treated as if it were

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12 42 U.S.C. § 602(a)(26).

13 42 U.S.C. §602(a)(8)(A)(vi); 42 U.S.C. § 657(b).

income, makes the family ineligible for an assistance payment." In such event the family receives the full amount of the support payment.[14]

Congress again amended The Social Security Act in 1988 to replace the AFDC program with a comprehensive program of mandatory child support and work training. Publ.L. 100-485, 102 Stat. 2345 (1988). The revisions are designed to emphasize parental responsibility and strengthen the child support enforcement system. States are required to establish guidelines which must be used in setting child support awards.[15] Additionally, they are required to provide mechanisms to facilitate the periodic updating of child support awards,

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14 45 C.F.R. § 232.20(b) (1987).

15 These guidelines are binding on judges and other officials unless there is good cause shown.

and to institute a system of immediate wage withholding for all new or revised child support cases. The bill provides for the establishment of a commission on interstate enforcement, the establishment of an automated tracking and monitoring system, and the use of parents' social security numbers for identification purposes at birth, among other things. Under II. General Discussion of the bill, the Senate Report states:

> We need now to fashion a firm and effective welfare structure, one that addresses the needs of all areas of the country.
>
> The bill reported by the Committee on Finance seeks to do this. It builds upon a strong consensus, joined in by liberals and conservatives alike, that the Nation's welfare system must stress family responsibility and community obligation, enforce the principle that child support must in the first instance come from parents, and reflect the need for benefit improvement, program innovation, and organizational renewal at every level and the system.

Id.

One of the major elements in the revision of The Act is to strengthen the child support system by improving all stages of the enforcement process. It requires the Secretary "to set standards specifying time limits in which a state must respond to requests for service, including requests to locate absent parents, establish paternity, or initiate proceedings to establish and collect support." This addition eliminates the possibility of a time delay inherent in the system as it was at the time the instant suit was filed.

B. Procedural History

Gwendolyn Brown is the mother of three minor children. The oldest child, Kateia Nicole Pinkston, was born out of wedlock January 22, 1977. Except for short periods of time when she was able to obtain employment, Ms. Brown received AFDC benefits under the Georgia Title IV-A program for Kateia from 1978 through 1987.

As a condition to receive AFDC, pursuant to the enacting legislation, Ms. Brown was required to cooperate with the state in establishing Kateia's paternity and securing a support order for her.[16] She was further required to assign to the state her right to support monies paid on Kateia's behalf.[17]

Although the Georgia Department of Human Resources (the IV-D agency) has the responsibility of locating Kateia's father, establishing paternity for her, and

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16 42 U.S.C. § 602(a)(26)(B).

17 42 U.S.C. § 602(a)(26)(A). As the court has noted, except for the first fifty dollars of child support collected each month, which is paid to the family and <u>does not affect the family's AFDC eligibility or decrease any amount otherwise payable as assistance to such family</u>, the state retains support collections to help offset welfare expenditures on the family's behalf.

obtaining a support order on her behalf, the Georgia IV-D agency has yet to do so.

In 1977, Ms. Brown was married. The two children of the marriage are Crystal Sabrina Brown, born January 4, 1979, and Jeriquces Blane Brown, born November 1, 1980. When their father deserted the family, Ms. Brown applied for and received AFDC for these two children as well as Kateia.[18]

Ms. Brown was divorced from Mr. Brown in November 1982. The divorce decree ordered Mr. Brown to pay twenty dollars per week as support for each of his children. The Georgia IV-D agency has failed to collect the payments.

Joy Wehunt Lewallen, the original plaintiff in this action, brought suit to

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18 The application and receipt of benefits was pursuant to statute.

obtain IV-D agency assistance in establishing the paternity of and support for her youngest child Tiffany, born in December 1983. Although she had received intermittent AFDC payments it was not until suit was filed in May 1985 that the Georgia IV-D agency took steps to determine paternity and secure child support for Tiffany.[19]

Brenda White, one of the intervenors, mother of three minor children, receives no paternal support for two of her children. Ms. White has received intermittent AFDC payments from about 1969 onward. During this period of time, although she has cooperated with the agency, as have Ms. Brown and Ms. Lewallen, the agency has taken no action to secure support for her children.

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19 Under the 1988 amendments placement of time limitations for compliance with the statute will prevent undue delay.

This action was brought to Lewallen on May 9, 1985, in the Federal District Court for the Northern District of Georgia. Lewallen asserted a claim under 42 U.S.C. § 1983 against the Commissioner of the Georgia Department of Human Resources hereinafter the Commissioner seeking declaratory and injunctive relief with respect to defendant's violation of her rights under two Social Security Act programs, the AFDC 42 U.S.C. §§ 601, et seq. (Title IV-A), and the Child Support and Establishment of Paternity Act, 42 U.S.C. §§ 651, et seq. (Title IV-D). The Title IV-A claims against the Commissioner were settled after he adopted a revised policy as to the definition of "child support." This definition was incorporated into a consent order agreed to by all parties and adopted as the order of the district court on January 20, 1987. Thus, the Title IV-A claim is not at issue in the

instant appeal. Lewallen's remaining claim against the Commissioner centered around his failure to provide her with the services necessary to locate the father of her child, establish paternity of that child, and establish and enforce a support obligation for that child, in violation of the Child Support and Establishment of Paternity Act. Plaintiff Lewallen also sued the Secretary, asserting that he had failed in his duty to oversee Georgia's operation of its state plans under Titles IV-A and IV-D and in his obligation to enforce compliance by the Commissioner with the conditions of participation in the AFDC program.

On October 23, 1985, the district court granted the motion of Brenda White and Gwendolyn Brown to intervene as plaintiffs and to file an amended complaint. Plaintiffs then moved for class certification and for leave to file a

second amended complaint to clarify certain class allegations. In their second amended complaint, plaintiffs made clear that the class injury for which they sought redress was the Commissioner's systematic failure to (1) implement and operate a statewide child support enforcement program which diligently sought to establish paternity, locate absent parents, establish child support obligations and collect child support, as required by Title IV-D and its implementing regulations; and (2) assure that the Georgia IV-D program operated in compliance with the statute and regulations. Leave to file a second amended complaint was granted, and the plaintiffs initiated discovery as to both defendants.

At plaintiffs' request, a status conference was held April 23, 1986. At that time the court directed that any motions under Fed.R.Civ.P.12 be filed

within thirty days. The court also stayed discovery, deferred plaintiffs' motions to compel discovery and class certification, granted plaintiffs the opportunity to redefine their class, and stated its intention to extend discovery if plaintiffs' case survived any Rule 12 motions. The Commissioner and the Secretary filed motions to dismiss under Rule 12, claiming the plaintiffs had failed to state claims upon which relief could be granted. The plaintiffs responded to the defendants' motion to dismiss, and also moved for leave to file a third amended complaint.

On October 1, 1986, the court entered an order holding that, under Brown v. Housing Authority of McRae, 784 F.2d 1533 (11th Cir. 1986), vacated pending reh'g en banc, 804 F.2d 612 (11th Cir. 1986), on reh'g, 820 F.2d 350 (11th Cir. 1987), the plaintiffs' claim against the Commissioner

under 42 U.S.C. § 1983 and their claim against the Secretary under 423 U.S.C. §§ 651 et seq., had to be dismissed under Rule 12(b)(6). The district court reasoned that Congress had foreclosed private enforcement of Title IV-D and there was no implied right of action under the statute. In its order, the district court granted the plaintiffs' motion for leave to file a third amended complaint, and denied as moot the plaintiffs' motion for class certification.

On October 17, 1986, plaintiffs filed their third amended complaint, asserting claims against the Secretary under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq [hereafter APA], and for mandamus relief pursuant to 28 U.S.C. § 1361. In addition, in order to appeal, plaintiffs sought entry of a judgment based on October 1, 1986, order under Fed.R.Civ.P. 54(b). In light of the fact

that the Eleventh Circuit Court of Appeals had vacated its decision in Brown v. Housing Authority of McRae, pending rehearing en banc, the plaintiffs also moved in the district court for an order setting aside the October 1, 1986, order. In an addendum to that motion plaintiffs brought to the district court's attention the Supreme Court's decision in Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), which implicitly overturned parts of the Brown decision.[20]

The Secretary answered the plaintiffs' third amended complaint and on December 3, 1986, filed a motion under Fed.R.Civ.P. 12, alleging that the plaintiffs had failed to state a claim upon which relief could be

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20 Relying on Wright, the en banc court in Brown remanded the case to the district court. 820 F.2d 350, 352 (11th Cir. 1987) (en banc).

granted. On January 14, 1987, plaintiffs moved for class certification on the APA and mandamus claims. The district court entered an order March 11, 1987, granting the Secretary's motion to dismiss and denying the plaintiffs' for class certification. The district court held that the plaintiffs lacked standing under the APA. The court also denied the plaintiffs' motion to set aside the October 1, 1986, order, concluding that its previous decision was not changed by Wright and Brown. Ms. Brown filed a notice of appeal as to both the state and federal defendants on May 8, 1987, and the appeal was docketed on May 29, 1987. Neither Lewallen nor White has appealed.

I.

[1] The first issue on appeal is whether the complaint states a cause of action against the state defendant under 42 U.S.C. § 1983. In Maine v. Thiboutot, 448 U.S. 1,

8, 100 S.Ct. 2502, 2506, 65 L.Ed.2d 555 (1980), the Supreme Court held that violation of a federal statute is cognizable under 42 U.S.C. § 1983. Since Thiboutot, however, the Court has delineated two exceptions to this general rule. Section 1983 does not encompass claims based on statutory violations if (1) Congress has foreclosed private enforcement in the enactment of the statute, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21, 101 S.Ct. 2615, 2626-27, 69 L.Ed.2d 435 (1981), or (2) Congress has not created enforceable rights in the relevant statutory provisions. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 24-25, 101 S.Ct. 1531, 1544-44, 67 L.Ed.2d 694 (1981).

[2] The analysis here requires a determination of whether plaintiff has a "right" under a federal statute and if so

whether the federal statute precludes beneficiaries from seeking enforcement of those rights in a private cause of action. The Commissioner urges that Title IV-D of the Act does not afford plaintiff an enforceable right as defined by the Supreme Court in Pennhurst. We agree and therefore find it necessary only to discuss that issue.

The State contends that Title IV-D was enacted to recoup welfare expenditures, to ease the burden on the state and federal fiscs, to check the rising tide of families forced to resort to public assistance, and to reward states which maintain "cost-effective and efficient child support recovery operations." By achieving net savings for federal, state, and local governments' welfare appropriations Title IV-D will benefit the general public.

Although state participation in the Social Security Act itself is mandatory,

participation by a state in the IV-D program is voluntary. It is enacted pursuant to the spending power of Congress. Case law interpretation of Congress' power to legislate pursuant to the spending power has recognized that when Congress fixes the terms on which it shall disburse federal money to the state, it is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. Pennhurst, 451 U.S. at 17, 101 S.Ct. at 1540, 67 L.Ed.2d at 707.[21] Pennhurst held that a funding statute that did not clearly condition the receipt of federal money on

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21 For cases holding Congress may fix the terms on which it shall disburse federal money to the states see Oklahoma v. CSC, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

the implementation of certain procedures did not create any enforceable rights.

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

451 U.S. at 17, 101 S.Ct. at 1540, 67 L.Ed.2d at 707 (citations and footnote omitted).

In Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26, 36 (1975), the Supreme Court enunciated four factors to determine whether a statute creates a private cause of action.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit,

> either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted).

The District of Columbia Circuit in Edwards v. District of Columbia, 821 F.2d 651 (D.C.Cir. 1987), affirmed the lower court's holding that public housing tenants did not have rights against constructive demolition of a housing project. In reaching its decision the court addressed the issue of when federal statutes create rights enforceable under § 1983 and discussed the Ash factors in reaching its conclusion.

> This question comprises the first of four factors used to determine whether to imply a cause of action from a federal statute . . . . Although now the second factor of the Cort test, which emphasizes a more direct and rigorous search for congressional intent, is given the greatest weight, see Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 3234 n. 9, 92

> L.Ed.2d 650 (1986) (listing post-Cort Supreme Court cases stressing strict fidelity to congressional intent in implied cause of action field), the first factor of the Cort test does look to whether "the plaintiff [is] 'of the class for whose especial benefit the statute was enacted' . . . -- that is, does the statute create a federal right in favor of the plaintiff?" . . . Supreme Court cases that employed the Cort test initially emphasized this first factor, and concentrated particularly on whether or not the statute in question speaks in terms of specific right and duties. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 690 n. 13, 99 S.Ct. 1946, 1954-55 n. 13, 60 L.Ed.2d 560 (1979) ....
>
> We believe the analogy to be sound despite the Court's subsequent movement in implied cause of action jurisprudence away from Cort's first factor and toward its second factor. This movement toward an exclusive focus on whether Congress intended to create a private cause of action indicates the Court's growing realization that it ought not conflate the question of whether a statute creates rights with the question of whether it creates a private cause of action to enforce those rights. However, in a case like ours, where a separate congressionally created cause of action, § 1983, clearly exists, then the focus on whether the statute creates rights is appropriate, and the value of the first Cort factor is retained.

821 F.2d at 655 n. 4 (citations omitted).

Title IV-D does not create any enforceable right: it was not enacted for

the "especial benefit" of AFDC families. A Title IV-D program operates under a separate legislative and regulatory framework than that of a Title IV-A program. Title IV-A provides funds from the public treasure to support children in need. Title IV-D seeks to recover those funds and restore the Treasury balance by enforcement of support obligations owed by the absent parents of these children. The driving force behind the program is recovery of welfare payments and a parallel commitment to remove and keep families from the necessity of welfare dependence by establishing and enforcing support obligations. The legislative history indicates that in enacting Title IV-D Congress was primarily concerned with collecting child support in order to reduce the welfare rolls.

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving Aid to Families With Dependent Children (AFDC), 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home.
>
> The Committee believes that all children have the right to receive support from their fathers. The Committee bill, like the identical provision passed by the Senate (H.R. 3153) last year, is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S.Rep. No. 93-1356, 93rd Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin.News 8133, 8145-46 (beginning paragraphs of "Section IV. Child Support").

The above-quoted language indicates the concern Congress felt over the welfare problem. Its reading indicates the goal of Title IV-D was to immediately lower the

cost to the taxpayer as well as to lessen the number of families enrolling in welfare in the future -- benefits to society as a whole rather than specific individuals. This reading is consistent with the concern evidenced by Congress in "Section II. Social Services" entitled Rapid rise in Federal funds for social services," and "Federal funds for social services limited in 1972," which precedes the section on child support.

Even before then, the legislative history preceding passage of Title IV-D indicates the concern Congress felt for increasing collection of support payments and thereby reducing the amount expended for welfare. The Report of the Committee on Finance of the United States Senate to accompany H.R. 3153 contains a section under "VII. Child Support (Sec. 151 of the bill)" entitled "incentives for Localities To Collect Support Payments." The language indicates

reimbursement of welfare costs is the incentive for states and localities to collect support payments.

> Under present law, when a State or locality collects support payments owed by a father, the Federal Government is reimbursed for its share of the cost of welfare payments to the family of the father; . . .
>
> In most States, however, local units of government, which would often be in the best position to enforce child support obligations, do not make any contribution to the cost of AFDC payments and consequently do not have any share in the savings in welfare costs which occur when child support collections are made. Since such a fiscal sharing in the results of support collections could be a strong incentive for encouraging the local units of government to improve their support enforcement activities, the bill would provide that if the actual collection and determination of paternity is carried out by local authority, the local authority would receive a special bonus based on the amount of any child support payments collected which result in a recapture of amounts paid to the family as AFDC.

S.Rep. No. 93-553, 93rd Cong., 1st Sess., Social Security Amendments of 1973, reprinted in Senate Miscellaneous Reports on Public Bills VII (emphasis added).

Title IV-D is also not a legal assistance program. AFDC recipients do not apply for nor request support enforcement services. They assign their child support rights to the state[22] and are required to cooperate (unless good cause for refusing to do so is determined to exist) in whatever legal action the state undertakes.[23] By assigning their child support rights in

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22 In return for this assignment of rights they receive AFDC aid. This quid pro quo is the mutual consideration which passes between the parties to the contract, and which renders it valid and binding.

23 "Cooperate" includes the following: (1) appearing at an office of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by the applicant or recipient; (2) appearing as a witness of judicial or other hearings or proceedings; (3) providing information, or attesting to the lack of information, under penalty of perjury; and (4) paying to the child support agency any support payments received from the absent parent after an assignment. 45 C.F.R. § 232.12(b).

return for AFDC aid, they give the states the opportunity to recoup the financial drain imposed by the welfare system on the state and federal treasures. As was its intent, as evidenced by the language of the statute and the legislative history, diminishing the welfare outlay benefits society as a whole. Consistent with that intent we cannot hold that Title IV-D creates enforceable rights under Pennhurst.

II.

The plaintiffs also sued the Secretary of the Department of Health and Human Services alleging a failure to enforce Title IV-D. That claim was brought either under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.,[24] or under Title IV-D

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24 In Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184, 188 (1970) the court held the Administrative Procedure Act "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'"

itself. The district court found that the plaintiffs lacked standing to sue the Secretary and that no private cause of action could be implied under Title IV-D. Since we find that the appellant has no article III standing to sue the Secretary, we necessarily find that she cannot sue under the APA or Title IV-D.

[3] In order to have standing to sue under the APA, the plaintiffs must be injured in fact, and "the interest sought to be protected . . . [be] arguably within the 'zone of interests' to be protected or regulated by the statute." Clarke v. Securities Industry Assn., 479 U.S. 388, 394, 107 S.Ct. 750, 755, 93 L.Ed.2d 757, 766 (1987)[25] We need not, however,

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25 The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to

[Footnote continued on following page]

consider whether the appellant is within the zone of interests protected by Title IV-D because we find that she lacks article III standing.

[4] Federal courts may only decide actual cases and controversies. The doctrine of article III standing determines whether the plaintiff is entitled to have the court decide the merits of a dispute. Allen v. Wright, 468 U.S. 737, 750-51, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984). There is a core constitutional requirement that a plaintiff allege some

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> complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke, 479 U.S. at 399, 107 S.Ct. at 757, 93 L.Ed.2d at 769.

actual or threatened injury that is fairly traceable to the defendant and can be remedied by an order directed against the defendant. Id. In this case, the plaintiff alleges two distinct injuries: the loss of fifty dollars in support and the failure to establish her child's paternity. These injuries are sufficiently distinct to be judicially cognizable. 468 U.S. at 755-58, 104 S.Ct. at 3327-3330, 82 L.Ed.2d at 571-74 (claim of injury from government's noncompliance with law too general to be judicially cognizable but injury of diminished ability to receive integrated education is cognizable).

There must also be a nexus between the injury and the action of the defendant. The injury must both be caused by the defendant and be remediable by the defendant. In Allen v. Wright, the Supreme Court found that parents had no standing to challenge the Internal Revenue Service's

administration of guidelines concerning the tax status of racially discriminatory private schools. The Court held that the injury alleged by the plaintiffs (the reduced ability to receive an integrated education) was caused directly by the school's policy of discrimination and was only indirectly encouraged by the IRS policy. The Court held that the causal connection between the IRS's application of their guidelines was too attenuated to allow the plaintiffs to sue the IRS because granting relief against the IRS would not guarantee that the schools would forego their racially discriminatory practices. 468 U.S. at 759, 104 S.Ct. at 3328-29, 82 L.Ed.2d at 574; see also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-44, 96 S.Ct. 1917, 1926-27, 48 L.Ed.2d 450 (1976) (claimed injury of reduction in hospital services not

sufficiently traceable to IRS revenue ruling to confer standing).

[5] In this case the appellant alleges the inaction by the Secretary has allowed the State of Georgia to ignore the Title IV-D requirements and has resulted in the injury to the plaintiffs. She relies on little more than the remote possibility, unsubstantiated by allegations of fact, that her situation might have been better had the defendant acted otherwise, and that her situation might improve were the court to afford relief. Appellant's injury is directly related to the absence of the fathers who have deserted their families to welfare -- not because she assigned her rights to support payments in return for AFDC aid. The court might add that had she been receiving support payments from the father it would not have been necessary for her to assign her support rights to the

State of Georgia. The assignment directly benefited her financially.

The nexus that the appellant alleges between the injury and the Secretary is attentuated at best since the injury is directly caused by a third party who is not a party to the lawsuit, namely the absent father. The attenuation and lack of redressability are clear since the appellant concedes that even rigorous enforcement of the child support laws does not guarantee that any father will be located and if so that any child support will be collected. The chain is even more attenuated, however, since the plaintiffs seek to sue the Secretary because nothing the Secretary can do will actually remedy the injury suffered by these plaintiffs. The only weapon of the Secretary is to withhold a portion of the federal funds if Georgia does not comply with the statute. It is far from certain that the withholding

of 1935, provides monetary payments from the state to financially needy families which include children deprived of parental support due to death, disability, or desertion. 42 U.S.C. § 601. States are not required to participate in the AFDC program, but if they choose to do so, they must operate a program which meets the statutory requirements in 42 U.S.C. § 602, as well as the provisions of detailed federal regulations promulgated by the Secretary. See 45 C.F.R. §§ 201, et seq. An explicit condition for the receipt of any federal AFDC money is that participating states have in effect a plan for child support collection which meets the standards set forth in Title IV-D of the Social Security ACt, 42 U.S.C. §§ 651, et seq. The state must operate a child support recovery program in substantial compliance with that plan. 42 U.S.C. § 602 (a)(27).

B. Title IV-D

The federal government has made efforts since 1950 to require that absent parents support their children. The Social Security Act Amendment of 1950, Ch. 809, § 321(b), 64 Stat. 549 (codified as amended at 42 U.S.C. § 602(a)(1)), required welfare workers to inform law enforcement officials of cases in which AFDC was needed due to abandonment by a parent. In 1967, Congress began requiring that states set up formal child support recovery programs, with the federal government providing half the funding. Social Security Act Amendment of 1967, Pub.L. No. 90-248 § 211, 81 Stat. 896 (codified as amended at 42 U.S.C. § 602(a)(17). However, despite the federal funding, state programs for child support recovery were near-complete failures and federal oversight was almost non-existent.

of the funds will result in more vigorous enforcement of the Georgia child support laws. It is clear that the plaintiffs "rely on little more than the remote possibility . . . that their situation might have been better had the [Secretary] acted otherwise, and might improve were the Court to afford relief." Warth v. Seldin, 422 U.S. 490, 507, 95 S.Ct. 2197, 2209, 45 L.Ed.2d 343 (1975).

We find that the appellant has failed to prove the challenged practices harm her and that she would benefit in a tangible way from the court's intervention. We find that Title IV-D was not enacted to confer a private cause of action on the appellant or any other person similarly situated. Where a federal statute provides its own comprehensive enforcement scheme, as here, the requirements of that enforcement procedure may not be by-passed by bringing suit directly. A ruling to the contrary

would open the door for multitudinous suits to be decided by federal court adjudication. It is not the function of the judiciary to direct the Secretary in the fulfillment of his role as overseer of the IV-D program. Such could not have been the intent of Congress.

> "Carried to its logical end, [appellants'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."
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> . . . . .
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> "[a] federal court . . . is not the proper forum to press" general complaints about the way in which government goes about its business.

Allen v. Wright, 468 U.S. at 759, 104 S.Ct. at 3329, 82 L.Ed.2d at 575-76.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

I respectfully dissent from the majority's discussion of the plaintiff's right to sue the state defendants. I object both to the analysis employed in determining whether section 1983 provides a cause of action for the violation of Title IV-D and also to the majority's interpretation of Title IV-D. The state defendants have not established that Title IV-D precludes reliance on section 1983 by private plaintiffs to ensure that the state is in compliance with the statute.

Section 1983 expressly gives individuals the right to sue a state for its noncompliance with a federal statute. Maine v. Thiboutot, 448 U.S. 1, 8, 100 S.Ct. 2502, 2506, 65 L.Ed.2d 555 (1980). Although the Supreme Court has found two exceptions to this general rule, it recently held that the burden of proving

that private enforcement is precluded rests with the state.

> Under these cases, if there is a state deprivation of a "right" secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.

Wright v. City of Roanoke Redevelopment Authority, 479 U.S. 418, 423, 107 S.Ct. 766, 771, 93 L.Ed.2d 781 (1987) (emphasis added). The burden is placed on the state actor because courts should not "lightly conclude that Congress intended to preclude reliance section 1983 as a remedy." Id. (quoting Smith v. Robinson, 468 U.S. 992, 1012, 104 S.Ct. 3457, 3469, 82 L.Ed.2d 746 (1984).

Instead of placing the burden of proof on the defendant in this case, the majority relies at least partially on case law concerning whether a private cause of action can be implied under a federal statute. In Cort v. Ash, 422 U.S. 66, 78,

95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), the Supreme Court announced a strict four part test to determine whether Congress intended a private cause of action. Under the Cort test, however, the plaintiff must affirmatively prove that Congress intended to allow a private cause of action.

The majority's confusion of the two different lines of case law is extremely significant in this case. The factors considered under each test are similar. But, the fact that the burden of proof is on a the state in a section 1983 suit and on a plaintiff in an implied cause of action suit is of fundamental importance. Therefore to the extent that the majority's reliance on the implied right of action cases reflects a misunderstanding of the burden of proof on this issue, the foundation of the majority's analysis evaporates.

Furthermore, I dissent because the majority has misinterpreted Title IV-D and misread its legislative history. While no one can deny that the statute helps recover some of the money spent on AFDC, there is nothing in the statute or its legislative history which supports a finding that fiscal conservation was the goal of the statute. Rather, Congress made clear that it was concerned about the rising number of children who were abandoned by their fathers. The statute's clear intent to benefit the children and their families creates enforceable rights under section 1983.

I. Statutory Framework

A. Aid to Families with Dependent Children (AFDC)

AFDC (Title IV-A of the Social Security Act), is a federal-state cooperative effort administered by the states. The AFDC program, created by the Social Security Act

Therefore, in 1974, Congress enacted the Social Security Amendments of 1974 (the 1974 amendments), Pub.L. No. 93-647, 88 Stat. 2351 (codified as amended at 42 U.S.C. §§ 652, (et seq.). Designed "to assure an effective program of child support," the 1974 amendments were a radical revision of the previous law. S.Rep. No. 93-1356, 93rd Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & Admin.News 8133, 8148-8149. The 1974 amendment increased the federal matching funds from 50% to 75% as an incentive for the states to develop the appropriate programs (one of which was a Title IV-D agency). Similarly, incentive payments were available to any local governmental units which improved their enforcement of support orders. Noting that "the enforcement of child support obligations is not an area of jurisprudence about which this country can be proud," id., reprinted

in 1974 U.S. Code Cong. & Admin. News at 8146, the primary focus and intended beneficiary of the Act was the child and the family unit.

Before the 1974 amendments, any child support paid to the AFDC family was counted dollar-for-dollar in reducing the amount of the AFDC grant. The 1974 amendments provided that the state require individuals to assign to the state their right to receive child support payments as a condition of receiving the AFDC grant. Pub.L. No. 93-647, § 101(e)(5), 88 Stat. 2351 (codified at 42 U.S.C. § 602(a)(26)(A)). Thus the families were assured of receiving a set amount of money each month regardless of the personal vicissitudes of the absent parent.

After minor intervening amendments, a second sweeping set of changes in the child support enforcement requirements of the Social Security Act was instituted with the

Child Support Enforcement Amendments of 1984, Pub.L. 98-378 (the 1984 amendments), 98 Stat. 1305 (codified at 42 U.S.C. §§ 651, et seq.). In strengthening the Title IV-D requirements, Congress again focused on the needs and rights of families and children and the benefits to them of a strong, efficient, and effective child support recovery program. The 1984 amendments required the states to pass laws allowing for mandatory wage withholding and continuing garnishments, voluntary wage assignments, and the use of liens, 42 U.S.C. §§ 654(20), 666. In addition, more federal cooperation was extended through federal tax withholding availability, 42 U.S.C. § 664, and extending access to the federal Parent Locator Services, 42 U.S.C. § 663.

These amendments were intended to ensure that "all children in the United States who are in need of assistance in securing

financial support from their parents will receive assistance regardless of their circumstances." S.Rep. No. 98-387, 98th Cong., 2d Sess., at 1, reprinted in 1984 U.S. Code Cong. & Admin.News, 2397, 2397 (emphasis added). Congress mandated that Title IV-D child support recovery and paternity establishment services be provided to both AFDC and non-AFDC recipients. 42 U.S.C. §§ 651, 654(6).

Within days of the passage of the 1984 amendments, Congress also passed the Deficit Reduction Act of 1984 (DEFRA), Pub.L. No. 98-369 § 2640, 98 Stat. 1145. One of the provisions in DEFRA, section 2640, provided that, when a non-custodial or absent parent of children receiving AFDC makes support payments to the state, the first fifty dollars collected would be paid to the family without affecting its eligibility for assistance or decreasing

the amount of assistance it received. 42 U.S.C. §§ 657(b)(1), 602(a)(8)(A)(vi).

The law prior to 1988 required states, on penalty of the withholding of the AFDC funds, to have in effect and operate a child support enforcement program which meets the requirements of Title IV-D of the Social Security Act, 42 U.S.C. § 602(a)(27); see 45 C.F.R. §§ 302.12, 303.20. The state must undertake the establishment of paternity and the establishment and enforcement of support obligations for all AFDC children unless it is against the best interests of the child to do so. 42 U.S.C. § 654(4); 45 C.F.R. §§ 303.4(b), 303.5, 303.6. The state must provide Parent Locator Services, 42 U.S.C. § 654(8), and must comply with all other requirements and standards of the Secretary. 42 U.S.C. § 654(13). These services must be available for nonrecipients of AFDC as well. 42 U.S.C.

§§ 651, 654(6); 45 C.F.R. 302.33(a). In addition, the state is under an obligation to publicize the availability of such services. 45 C.F.R. § 302.30.

In 1988 Congress increased the obligations of the states. Pub.L. No. 100-485, 102 Stat. 2346 (1988). Of particular significance is that Congress directed the Secretary to promulgate regulations establishing the time frame within which states must respond to requests to enforce child support orders or establish paternity. Pub.L.No. 100-485, § 121, 102 Stat. 2351. This was to insure action on the part of the states-the particular action being sought by plaintiffs in this case.

II. The Section 1983 Claim

The plaintiffs brought this suit against the state defendants under 42 U.S.C. § 1983 alleging that Georgia has not complied with the requirements of Title IV-D. It is

clear that section 1983 encompasses claims based on purely statutory violations of federal law. Maine v. Thiboutot, 448 U.S. at 8, 100 S.Ct. at 2504-05 (1980). There are, however,

> "two exceptions to the application of § 1983 to statutory violations." . . . First, if Congress has foreclosed private enforcement of the statute in question in the enactment of the statute itself, then § 1983 is unavailable to enforce federal rights under the statute... For example, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." ... Second, if Congress has not created enforceable rights in the relevant statutory provision, there is no cause of action available under § 1983.

Silver v. Baggiano, 804 F.2d 1211, 1216 (11th cir. 1986) (quoting Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21, 101 S.Ct. 2615, 2626-27, 69 L.Ed.2d 435 (1981)).

A. Does Title IV-D Create Enforceable Rights?

In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101

S.Ct. 1531, 67 L.Ed.2d 694 (1981), the Supreme Court held that section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et seq., did not create substantive rights in favor of the disabled. Section 6010, which was called the "bill of rights" provision of the Act, provided that Congress made certain "findings": (1) that persons with developmental disabilities have a right to appropriate treatment, services, and rehabilitation; (2) that the treatment for a person with developmental disabilities should be designed to maximize the developmental potential of the individual and should be provided in the least restrictive setting; and (3) that the federal government and the states both have an obligation to assure that public funds are not provided to any institution which does not provide treatment appropriate to

1987) (mandatory language in Food Stamp Act creates rights enforceable under § 1983). Additionally, the clarity with which the conditions are set out may be an important consideration for the enforceability of conditions relies on the knowing and voluntary assumption of the conditions by the state. Pennhurst, 451 U.S. at 17-18, 101 S.Ct. at 1539-40; Edwards v. District of Columbia, 821 F.2d 651, 656 (D.C. Cir. 1987).[1] Furthermore, a review of the

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[1] In fact, the use of mandatory language alone may be sufficient to find the creation of enforceable federal rights. This court in Gonzalez v. Pingree, 821 F.2d at 1528, relied solely on the existence of mandatory language in 7 U.S.C. § 2020 to hold that individuals have an enforceable right to food stamps. At least one judge on the D.C. Circuit, however, has read Pennhurst more broadly. Edwards v. District of Columbia, 821 F.2d at 659 (opinion of Wald, J.). Judge Wald reads Pennhurst to require a statute to unambiguously create duties in language which "narrowly cabins the discretion of

[Footnote 1 continued on following page.]

legislative history of the statute and other traditional aids of statutory interpretation helps determine the legislative intent. Pennhurst, 451 U.S. at 23-28, 101 S.Ct. at 1543-45.

Unlike section 6010, the provision at issue in Pennhurst, Title IV-D is cast in mandatory terms. As a condition of receiving matching AFDC funds, states "must" have and operate a Title IV-D plan. 42 U.S.C. § 602(a)(27). Moreover, Title IV-D requires that state child support

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[Footnote 1 continued from preceding page]

officials, and by the same terms, secures rights to a specific class of people." Id. at 656. This expansive reading of Pennhurst may be precluded by the Supreme Court's interpretation of Pennhurst in School Board of Nassau County v. Arline, 480 U.S. 273, 286 n. 15, 107 S.Ct. 1123, 1130 n. 15, 94 L.Ed.2d 307 (1987), and Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987); see Edwards, 821

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plans "must provide" that the state "will undertake" to "establish the paternity" of a child born out of wedlock and "secure support for such child from his parent" unless it is against the best interests of the child to do so. 42 U.S.C. § 654(4)-(5). In addition, Title IV-D requires

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F.2d at 668 (Wills, J. dissenting). In Arline, the Court made clear that Pennhurst turned on the fact that the language of the statute was precatory not mandatory. 480 U.S. at 286 n. 15, 107 S.Ct. at 1130 n. 15. Similarly, in Wright, the Court summarily dismissed the argument that the mandatory language concerning rent ceilings in the Fair Housing Act did not create enforceable rights. 479 U.S. at 432-35, 107 S.Ct. at 775-76.

The majority's reliance on Judge Wald's opinion in Edwards, therefore, is troubling. Besides the flawed reasoning on the burden of proof pointed out before, supra, Edwards represents a reading of Pennhurst that has not been adopted by the Supreme Court or this court. Nevertheless, even under the majority's reading of Pennhurst, I believe the statute creates enforceable rights since the statute clearly imposes obligations on the states for the benefit of families with absent parents.

states to notify families "at least annually" of the amount of child support collected in their behalf, 42 U.S.C. § 654(5), and give to families the first fifty dollars in child support collected each month, 42 U.S.C. §§ 602(a)(8)(A)(vi), 657(b)(1). The section also expressly conditions the receipt of federal funds on the state submitting a IV-D plan. 42 U.S.C. § 602(a)(27). Additionally, a subsequent failure to substantially comply with Title IV-D results in the mandatory withholding of a percentage of matching AFDC funds unless the state submits corrective action for achieving compliance. 42 U.S.C. § 603(h). The mandatory nature of the conditions therefore set this statute apart from the one considered in Pennhurst. Title IV-D is further distinguishable from 42 U.S.C. § 6010 interpreted in Pennhurst because it does not merely express a general

the needs of the person or does not meet federal standards.

The Court found that Congress did not intend to create a substantive right to appropriate treatment in the least restrictive environment. 451 U.S. at 32, 101 S.Ct. at 1547. The Court considered both the language of the statute and the legislative history and concluded that the Act was meant to "assist" the states in improving the care and treatment of the mentally disabled. Id. at 18, 101 S.Ct. at 1540. In determining Congressional intent, the Court concluded that section 6010 was merely a "general statement of 'findings'" and therefore "too thin a reed" to support the notion that it created substantive rights. Id. 101 S.Ct. at 1541. The Court also reasoned that section 6010 did not impose any conditions on states for receipt of federal funds and that federal regulations explicitly provided that

federal funds could not be withheld for failure to comply with section 6010. Finally, the Court noted that the relatively small amount of federal money given to states confirmed that Congress had a limited purpose in enacting section 6010. Id. at 24, 101 S.Ct. at 1543.

In determining whether a statute creates enforceable rights, therefore, the key to the inquiry is the intent of the legislature. The question focuses on whether Congress intended to mandate state compliance with specific conditions or whether it merely intended to encourage state behavior. This intent is discerned from the plain language of the statute, for Congress must explicitly set out the conditions placed on federal aid. The use of mandatory rather than precatory language is an important factor. Pennhurst, 451 U.S. at 20, 101 S.Ct. at 1541; see Gonzalez v. Pingree, 821 F.2d 1526, 1528 (11th Cir.

preference for more vigorous enforcement of support orders; rather it requires states to adopt specific procedures for enforcement. In addition to requiring the state to create a system to locate delinquent parents, the states must allow for judicial determination of paternity until child reaches eighteen. 42 U.S.C. § 666(a)(4). The states must also adopt laws providing for expedited procedures for obtaining and enforcing support orders. 42 U.S.C. § 665(a)(2). Additionally, and perhaps most significantly, the states are required to pass laws creating specific remedial devices to ensure more effective enforcement of the child support awards. States are required to establish a system of wage withholding, reduction in tax returns of a delinquent parent, the use of liens against real and personal property, the posting of security or a bond, and procedures for reporting significant

arrearages to credit reporting agencies. 42 U.S.C. § 666(a)(1)-(7). 45 C.F.R. § 302.70[2] Although the use of the remedial devices other than wage withholding are somewhat discretionary to the State, the wage withholding provisions and the establishment of an expedited system of obtaining and enforcing the support obligations are mandatory. Indeed, section 666(b) explicitly sets out the criteria a wage withholding plan must contain. The specificity of these requirements belies any comparison with the generalized

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2 The regulations are even more specific. The state must maintain an effective system to identify delinquencies in support payments within thirty days and must enforce those delinquencies through a contempt order, garnishment proceedings, proceedings against real property or the other remedial devices listed in the statute. 45 C.F.R. § 303.5.

"findings" in section 6010 in Pennhurst[3] credulity to argue that participating states" did not know of their obligations under those sections.

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[3] Section 6010, at issue in Pennhurst, was interpreted to be merely a recommendation by Congress as to the appropriate treatment of mentally retarded individuals. The Supreme Court based its finding that the section did not create enforceable rights on a comparison of section 6010 to other sections (sections 6011, 6033) which did expressly condition receipt of funds on compliance with those sections of the statute. 451 U.S. at 26, 101 S.Ct. at 1544.

A similar comparison can be done in this case. On the one hand, the sections of the statute at issue (sections 654, 666) expressly condition receipt of federal money on compliance with specific conditions. There are, however, two sections of the Act which more closely resemble section 6010 in Pennhurst and may not create enforceable rights. First, the 1984 amendments contained a section entitled "Sense of Congress" in which Congress made "findings" that the states should focus on the important issues of child support, custody and visitation because of the importance of these issues to the health of "our

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The state attempts to contradict the language in Title IV-D by arguing that the legislative history indicates that in enacting Title IV-D Congress was primarily concerned with collecting child support in

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nation's children." H.Cong.Rep. No. 98-925, 98th Cong.2d Sess. at 59, reprinted in 1984 U.S.Code Cong. & Admin.News at 2477. That section closely resembles section 6010 in Pennhurst because it merely encourages the states to reconsider their approach to the issue of family law. Section 667 of the amended act also resembles section 6010 in Pennhurst. Section 667 requires that states establish uniform guidelines with respect to determinations of child support. Although the language of the section mandates the creation of guidelines as a condition for receipt of federal funds, under the majority's reading of Pennhurst the fact that no specific guidelines were mentioned would require a holding that section 667 does not create enforceable rights. But see supra n. 1. Comparing the precatory language of the sense of Congress section and the lack of specific direction in section 667 to the clear language of sections 654 and 666, it is clear language of sections 6545 and 666, it is clear that the latter sections create enforceable rights.

order to reduce the welfare rolls. Nothing could be further from the truth. In 1974 the Senate Finance Committee stated that "[t]he immediate result [of Title IV-D] will be a lower welfare cost to the taxpayer, but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup." S.Rep. No. 93-1356, reprinted in 1974 U.S.Code Cong. & Admin. News at 8146 (emphasis added).

Because Title IV-D child support services are available to both AFDC and non-AFDC families, Congress' purpose was not simply to save money on welfare. Title IV-D is unambiguously phrased in terms of benefit to children and families. Title IV-D was passed

> [f]or the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such

> children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for aid under part A) for whom such assistance is requested[.]

42 U.S.C. § 651 (emphasis added). The legislative history echoes this purpose. In recommending the passage of Title IV-D, the Senate Finance Committee stated that "all children have the right to receive support from their fathers" and that Title IV-D was "designated to help children attain this right, including the right to have their fathers identified so that support can be obtained." S.Rep. No. 93-1356, reprinted in 1974 U.S. Code Cong. & Admin. News at 8146 (emphasis added).

Moreover, nothing cited by the majority contradicts this expression of Congressional intent. The majority finds the motivation of the Congress to be fiscal conservation based on two general discussions of the monetary benefit of the

programs and two subtitles to portions of the Senate report. The majority does not evaluate the Senate report as a whole. The report did note that welfare costs had risen, but the report nowhere stated that the bill was intended to reduce welfare costs.[4] To the contrary, the 1974 amendments increased the federal share of Social Security funding from 50% to 75%. Indeed, the clear intent was to provide more services to the public, since the report made clear that the increase in

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[4] Indeed the section which describes the rise in welfare costs merely sets out the background for the bill. The Senate Report explained that in light of the rise in federal spending on welfare, the regulations promulgated by HEW were inadequate. The purpose of the bill overall (since the bill applied to the entire Social Security Act), therefore, might be said to be a clarification or refinement of the requirements for the programs. S.Rep. No. 93-1356, reprinted in 1974 U.S. Code Cong. & Admin. News at 8135-36.

funding was to go to new services and was not to replace the state funds for existing services. S.Rep.No. 93-1356, reprinted in 1974 U.S. Code Cong. & Admin. News at 8134.[5]

Additionally, nothing in the 1984 amendments reveals an intent merely to recover the cost of AFDC.[6] The amendments

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5 This case is further distinguished from Pennhurst in that the Court in Pennhurst relied on the fact that the small amount of money appropriated by Congress contradicted the argument that the statute intended to order massive expenditures on the part of the state. In this case, Congress actually raised the already substantial federal funding in order to assure that the states would comply with Title IV-D.

6 I do not deny that the fact that support enforcement reimburses the state and federal government for AFDC expenditures is an advantage to this Act. However, as the House Committee on Ways and Means stated in recommending adoption of the Child Support Enforcement Amendments of 1984, the success of Title IV-D could not be measured in "terms of AFDC savings due to collections on behalf of recipients" because the "objectives behind the program are greater than merely recouping federal and state AFDC expenditures." H.R.Rep. No. 98-527, 98th Cong., 1st Sess., at 2930.

were passed because the states had not complied with existing law. The Senate therefore made the requirements more specific for the states and increased federal monitoring. The increased specificity of the conditions on the receipt of federal funds supports a finding that the statute creates enforceable rights.[7] The increased monitoring by the federal government is not relevant to the question of whether the statute creates rights, but rather to the second exception under Maine v. Thiboutot. Federal supervision is relevant to the question of

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[7] After this case was briefed, Congress passed a law revamping the existing welfare laws. Of significance to this case is that Congress required the states to adopt child support guidelines which will presumptively determine the amount of an award. Pub.L. No. 100-485, § 103, 102 Stat. 2346 (1988). In addition, wage withholding must be automatic in most new support awards. Pub.L. No. 100-485, § 101, 102 Stat. 2343. These new requirements support a finding that Title IV-D creates enforceable rights.

whether, despite the creation of rights, the statute shows an intent to preclude private enforcement through section 1983. That issue is discussed infra.

The defendants also argue that the statute creates no enforceable rights because it only requires the state to operate an effective system for recovering child support obligations and establishing paternity. The defendants claim that the statute does not create a right to actually receive support or a determination of paternity. But that is not what the plaintiffs are claiming. This case is not about whether Mr. Brown pays Mrs. Brown the child support he owes, but rather whether the State of Georgia has complied with the requirements of Title IV-D and established a system of identifying absent parents and enforcing their support obligations. The State of Georgia agreed to establish such procedures when it took the federal AFDC

money. The statute in mandatory language created an obligation on the part of the state to establish a certain procedure as already discussed.

The defendants may also be arguing that the plaintiffs should not be able to sue to force compliance with Title IV-D because the noncompliance does not affect them. The argument is that since the plaintiffs have assigned their right to support to the state, the failure to set up a recovery system under Title IV-D only hurts the state. This argument ignores several vital aspects of the statute. First, a family does receive the first fifty dollars in support collected. Second, non-AFDC recipients who wish to make use of a Title IV-D program certainly are affected by Georgia's failure to comply with the statute. Finally, the failure to create a system of establishing paternity clearly impacts on the AFDC and non-AFDC

recipients. The state argues that the establishment of paternity only serves to help the state get reimbursed for AFDC payments. This argument ignores the benefits to the child of a paternity determination. These benefits include the possibility of establishing an interpersonal or economic relationship with the father, increased access to family medical histories and the possibility of establishing inheritance rights or eligibility for Social Security benefits.

The plain language of the statute clearly conditions state receipt of federal funds on the establishment of specific state programs. The mandatory language of the statute as well as the specificity of the conditions clearly distinguish this case from Pennhurst. I would hold that Title IV-D does create rights which are cognizable under section 1983. Therefore, I must proceed to consideration of whether

the statute itself forecloses section 1983 as a remedy.

B. Has Congress Foreclosed Private Enforcement of Title IV-D?

On two occasions the Supreme Court has found that Congress intended to foreclose section 1983 actions for statutory violations. In Middlesex County Sewerage Auth. v. National Sea Clammers, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), the plaintiffs filed a section 1983 action alleging violations of the Federal Water Pollution Control Act (FWPCA). The Supreme Court held that the existence of statutory remedies in the FWPCA indicated that Congress did not intend to preserve section 1983 actions for violations of the FWPCA. The remedies under the FWPCA included two citizen-suit provisions, the ability of the EPA administrator to issue compliance orders and commence suits under the FWPCA, and the ability of interested persons to

seek judicial review of particular actions by the EPA administrator. Id. at 13-15, 20-21, 101 S.Ct. at 2622-23, 2626-27.

In Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed. 746 (1984), the plaintiffs brought a section 1983 action alleging violations of the Education of the Handicapped Act (EHA). The Supreme Court held that the EHA's elaborate procedural mechanisms indicated that Congress had foreclosed the section 1983 action. In addition to the Secretary's ability to withhold funds from state education agencies, the statute guaranteed written notice to parents of any decisions by the local education authorities, state administrative review of decisions by the local education authorities and judicial review of the administrative proceedings. Id. at 1011, 104 S.Ct. at 3467-68. In addition, the statute envisioned the cooperation of parents and local education

authorities in formulating individualized education programs for handicapped children and required local education authorities to review and, if necessary, revise each child's education program at least once a year. The Court also noted that there was no indication in the legislative history that Congress intended to allow circumvention of the EHA's administrative procedures. Id. at 1012-13, 104 S.Ct. at 3469.

Last year, in Wright v. City of Roanoke, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), the Supreme Court held that Congress had not foreclosed section 1983 actions for violations of the Housing Act. The plaintiffs in Wright, who were low-income tenants, brought a section 1983 suit claiming that a public housing authority (PHA) had overbilled them for utilities in violation of the Brooke Amendment to the Housing Act. The Court found that there

was no express indication that HUD enforcement was exclusive, but there were indications that private actions were anticipated. First, although the Housing Act provided for grievance procedures within the PHAs and administrative appeals, there was no procedure by which tenants could complaint to the Department of Housing and Urban Development (HUD) about the PHAs, and HUD itself had not reviewed the PHA grievance procedures. Id., 107 S.Ct. at 772. Second, the Housing Act did not establish private judicial remedies such as existed in Sea Clammers and Smith. Id. at 773. Third, although the tenants were able to sue in state court, that remedy did not prevent resort to § 1983. Id. at 773-74. Fourth, HUD's authority to audit the PHAs, enforce annual contribution contracts, and cut off federal funds was a generalized power which was "insufficient to indicate a congressional intention to

foreclose section 1983 remedies." The audits took place every eight years, and there were no other mechanisms to enable HUD to effectively oversee the performance of the country's 3,000 PHAs. Id. at 773.

In Gonzalez v. Pingree, 821 F.2d 1526 (11th Cir. 1987), this court addressed whether Congress had foreclosed section 1983 actions for violations of the Food Stamp Act. Like the Housing Act in Wright, the Food Stamp Act did not provide for private judicial enforcement. Id. at 1529. The Gonzalez court, relying on Wright, held that a section 1983 action could be brought despite the availability of state administrative procedures, the power of the Secretary of Agriculture to enforce state compliance with the Food Stamp Act by withholding funds or seeking injunctive relief, and the possibility that recipients could invoke the enforcement powers of the administering federal agency Id. at 1529-

30. The Gonzalez court also noted that the legislative history of the Food Stamp Act evidenced a congressional purpose to leave the avenues of private judicial enforcement open. Id. at 1530.

Title IV-D is devoid of any indication that Congress intended to foreclose a section 1983 action. Unlike the federal acts at issue in Sea Clammers and Smith, but like the federal acts in Wright and Gonzalez, Title IV-D does not provide for private judicial or administrative remedies such as citizen suits or judicial review of administrative procedures. The only enforcement action contemplated by Title IV-D is the federal government's audit and withholding of funds if the state is not "complying substantially" with federal law. Although this statute does require more frequent audits than the Housing Act at issue in Wright (once every year instead of once every eight years), this difference is

not determinative of the issue of private enforcement. The Secretary's withholding of funds is the only avenue available in the statute to remedy the violations. Federal oversight is not sufficient in and of itself to preclude private enforcement, for every federal statutory scheme which involves federal grants to the states necessarily involves federal supervision. See Rosado v. Wyman, 397 U.S. 397, 420, 90 S.Ct. 1207, 1222, 25 L.Ed.2d 442 (1970) (AFDC case) ("We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the State in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements."). Indeed section 1983 has long been used as a vehicle to bring claims of violations of the Social Security Act and

AFDC in particular. See Maine v. Thiboutot, 448 U.S. at 4, 100 S.Ct. at 2505 (listing cases); see also Lynch v. Dukakis, 719 F.2d 504, 510-11 (1st Cir. 1983) (Title IV-E); Bennett v. White, 671 F.Supp. 343, 345-48 (E.D. Pa. 1987) (Title IV-D); Wilcox v. Petit, 649 F.Supp. 685, 687-88 (D.Me.1986) (Title IV-D); Carter v. Morrow, 562 F.Supp. 311 (W.D.N.C. 1983) (Title IV-D).

Finally, nothing in Title IV-D's legislative history can be construed as congressional reluctance to allow section 1983 actions. In 1977 former AFDC recipients in Georgia brought an action against state and federal authorities challenging the collection and distribution of child support payments following the termination of AFDC benefits. See Seagrams v. Harris, 629 F.2d 385 (5th Cir.

1980).[8] Soon thereafter, Senator Nunn proposed an amendment to Title IV-D which supported the challenged practices. He

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[8] The question of whether section 1983 could serve as a basis for a claim of a violation of Title IV-D was not addressed by the court in Seagraves. Although there was an issue of whether there was a jurisdictional base for the claim in Seagraves, that issue was solved by allowing the plaintiffs to amend their complaint to add a constitutional claim. Before the amendment, the plaintiffs sought to establish jurisdiction under 28 U.S.C. § 1343 by alleging that the state's violation of the Social Security Act violated the Supremacy Clause. 629 F.2d at 389. That basis was not appropriate since the Supreme court had held in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), that section 1343 did not confer subject matter jurisdiction for violations of the Supremacy Clause. The next year, however, the Court held in Maine v. Thiboutot, 448 U.S. at 8, 100 S.Ct. at 2506, that violations of the Social Security Act could be brought under § 1983 and that the jurisdictional base is 28 U.S.C. § 1331. Although not discussed in Seagraves, it is clear that subject to the two exceptions to Thiboutot, claims of violations of federal statute by state actors brought under § 1983 are cognizable in federal court.

referred specifically to the Georgia lawsuit without questioning its propriety. See 123 Cong. Rec. S33865 (Oct. 17, 1977). Senator Nunn's amendment was enacted into law verbatim. Pub.L. 95-171, § 11, 91 Stat. 1357 (1977). This action cannot be consistent with an intent to foreclose section 1983 actions for violations of Title IV-D.

III. Conclusion

There can be no doubt that section 1983 can be used to challenge violations of Title IV-D. The state has failed to carry its burden of demonstrating that Congress intended to foreclose section 1983 actions, and it is clear that families with absent fathers are the intended beneficiaries of Title IV-D and have enforceable rights to effective paternity determinations and child support enforcement procedures.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-8345

JOY D. WEHUNT,

Plaintiff,

versus

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources, and LOUIS SULLIVAN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion September 26, 11 Cir., 1989, ____ F.2d____).

Before FAY AND CLARK, Circuit Judges, and GUIN*, District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

* Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOY D. WEHUNT, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. C85-2891
vs.	)	
	)	
JAMES G. LEDBETTER, et al.,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

This action is before the court on the defendants' separate motions to dismiss, the plaintiffs' motion for leave to file a third amended complaint, and the plaintiffs' motion for class certification. All but the motion for class certification will be GRANTED.

I. STATUTORY BACKGROUND.

The Child Support Enforcement Act was adopted in 1974 as Title IV-D of the Social Security Act, 42 USC §§ 651 et seq. (hereinafter "Title IV-D"), "[f]or the

purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children ... for whom such assistance is requested." 42 USC § 651. Under Title IV-D, as passed in 1974 and as amended in 1984, [1] "[b]asic responsibility for child support and establishment of paternity is left to the States, but the Federal Government also plays a major role in monitoring and evaluating State programs, providing technical assistance, and, in certain instances, in undertaking to give direct assistance to the States in locating absent parents and obtaining

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[1] August 16, 1984, Publ. L. 98-378, § 2, 98 Stat. 1305.

support payments from them." S.Rep. No. 387, 98th Cong., 6-7 reprinted in 1984 U.S. Code Cong. & Admin. News 2397, 2402-03.

The Act requires the Department of Health and Human Services to set up a separate organizational unit under the control of a person designated by and reporting directly to the Secretary to carry out the Secretary's responsibilities in child support enforcement. The Secretary has the responsibility of establishing the standards for state programs which he determines to be necessary to assure that the programs will be effective. In addition, he is required to establish minimum organizational and staffing requirements for state child support agencies. The Secretary is also required to review and approve state plans and to evaluate the implementation of state programs to determine whether they are in conformity with the federal requirements.

He must conduct annual audits of state programs to determine whether the actual operation of the program in each state conforms to the federal requirements and must impose a penalty if he finds non-compliance. The statute also requires the Secretary to provide technical assistance to the states to help them establish effective systems for collecting child and spousal support and establishing paternity.

Under the Child Support Enforcement Program, states are given access to the federal courts to enforce court orders for support. Another tool made available to the states by the statute is the Internal Revenue Service, through which, under certain circumstances, collections may be made on behalf of both AFDC and non-AFDC families. The statute also requires the Secretary to establish and operate a Federal Parent Locator Service to be used to find absent parents in order to enforce

child support obligations. Another major responsibility of the Secretary is to approve applications by the states for federal matching funds to be used to establish automatic data processing and information retrieval systems designed to assist in the administration of a child support program. Finally, the Secretary has the responsibility of assisting states in establishing adequate reporting procedures, and in providing the Congress with an annual report on all activities undertaken as part of the child support program.

The states are required to have state plans which set forth their functions and responsibilities. Each plan must provide that the state will undertake to secure support for an AFDC child whose rights to support have been assigned to the state, such assignment being a condition of eligibility for AFDC benefits. The state

plan must also provide for the establishment of paternity for AFDC children. With respect to non-AFDC families, the state must make available the child support collection and paternity determination services which are provided under the plan for AFDC families. Each state must attempt to enter into cooperative arrangements with appropriate courts and law enforcement officials to assist the IV-D agency in administering the program. The Act requires the IV-D agency to establish a State Parent Locator Service to locate absent parents using all sources of information available to the state as well as to the Federal Parent Locator Service. The agency must also maintain full records of collections and disbursements and have an adequate reporting system. In order to facilitate the collection of support in interstate cases, the state must cooperate with other

states in establishing paternity, locating absent parents, and in securing compliance with an order issued by another state. Finally, the statute requires each state to comply with any other requirements and standards that the Secretary determines to be necessary to the establishment of an effective support program.

The federal government pays seventy percent of state and local administrative costs for services to both AFDC and non-AFDC families on an open-end entitlement basis.[2] In addition, ninety percent federal matching is available on an open-end entitlement basis to states that elect to establish an automatic data processing and information retrieval system. Collections made on behalf of AFDC families

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2 The federal share will drop to sixty-eight percent in 1988 and to sixty-six percent in 1990. 42 USC § 655.

made on behalf of AFDC families are used to off-set the cost to the federal and state governments of welfare payments made to the family. The amounts retained by the government are distributed between the federal and state governments according to the proportional matching share which each has under a state' AFDC program. As an incentive to encourage state and local governments to participate in the program, the law provides for a payment equal to twelve percent of collections made on behalf of AFDC families. These incentive payments ar deducted from the federal share of collections and are to be retained by the level of government making the collections.

II. PROCEDURAL BACKGROUND.

This action was originally filed by plaintiff Joy D. Wehunt in May of 1985. Defendant Ledbetter ("the state defendant")

is sued in his official capacity as Commissioner of the Georgia Department of Human Resources. Defendant Bowen ("the federal defendant") is sued in his official capacity as the Secretary of the United States Department of Health and Human Services. Plaintiff Wehunt sought declaratory and injunctive relief for violations of her civil rights under Title IV-A (42 USC §§ 601 et seq.) and Title IV-D (§§ 651 et seq.). The Title IV-A program provides federal funds to participating states for the provision of financial assistance to families whose available income and resources are insufficient to meet the costs of necessary living expenses.

Wehunt alleged that the state defendant had failed in his obligations under the Social Security Act to establish paternity on her child's behalf, to collect child support, and to locate the absent

parent of her child.[3] Wehunt alleged that the federal defendant had failed in his duty to oversee the operation of state plans under Titles IV-A and IV-D and to insure that the state defendant complied with the conditions of participant in the AFDC program. Wehunt sought a declaration that the acts and practices of the state defendant in failing to initiate paternity and enforcement of support proceedings on her behalf and of the federal defendant in failing to review properly or adequately and to monitor the State of Georgia's operation of the child support enforcement

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[3] Wehunt also alleged that the state defendant had adopted a definition of "child support" that imposed requirements beyond those of Title IV-A, with the result that amounts paid to her by the absent father of her child had been labeled mere "contributions" and not "child support" and thus deprived her of the $50 child support disregard. That claim, however, is not at issue in these motions. The parties have informed the court that they expect to present a consent order on the Title IV-A claim in the near future.

program and the AFDC program subjected her to a deprivation of her rights under Titles 4-A and 4-D. She also sought a permanent injunction requiring the state defendant to initiate and conclude paternity proceedings on behalf of her child and to initiate and conclude recovery of child support proceedings on behalf of the child. She sought a preliminary and permanent injunction requiring the federal defendant properly to review, evaluate, and supervise the state defendant's actions under Titles IV-A and IV-D. Finally, Wehunt requested the court to retain jurisdiction over the defendants until the court was satisfied that the practices, policies, and omissions at issue were corrected and would not recur.

On October 23, 1985, the court granted the motion of Brenda White and Gwendolyn Brown to intervene as plaintiffs and to file a first amended complaint adding White

and Brown as plaintiffs and setting forth new class action allegations. Shortly thereafter, the plaintiffs moved for class certification and for leave to file a second amended complaint to clarify the class allegations. Leave to file the second amended complaint was granted. At a status conference on April 23, 1986, the court deferred the plaintiffs' motion for class certification pending further briefing on alternative classes, directed that all Rule 12 motions be filed within thirty days, stayed all discovery, and stated an intention to extend discovery four to six months from the ruling on the class certification if the case survived the Rule 12 motions. The plaintiffs subsequently submitted a re-definition of the class. Currently, in addition to the defendants' motions to dismiss, the plaintiffs' motion for class certification and a motion by the plaintiffs for leave to

file a third amended complaint, stating claims under the Administrative Procedure Act and for mandamus relief, are pending.

III. MOTIONS TO DISMISS.

A. Whether the Plaintiffs Have a Cause of Action against the State Defendant under 42 USC § 1983.

In Maine vs. Thiboutot, 448 U.S. 1 (1980), the Supreme Court concluded that 42 USC § 1983 authorizes suits to redress violations by state officials of rights created by federal statutes. The plaintiffs argue that the present case fails within the scope of Maine vs. Thiboutot because it is a suit by a private party claiming that a federal statute has been violated under color of state law, causing an injury. However, as the Supreme Court noted in Middlesex County Sewerage Authority vs. National Sea Clammers Association, 453 U.S. 1 (1981) ("Sea Clammers"), there are two exceptions to the

application of section 1983 as statutory violations. In deciding whether the plaintiffs have a cause of action against the state defendant under section 1983, the court must determine (1) whether Congress foreclosed private enforcement of Title IV-D in its enactment, and, if not, (2) whether Title IV-D creates enforceable "rights" under section 1983. Id. at 19.

The first question, then, is whether Congress has foreclosed private enforcement of Title IV-D. The conclusion that Congress did so, and that the plaintiffs' action against the state defendant must therefore be dismissed, is inescapable in light of the Eleventh Circuit's recent decision in Brown vs. Housing Authority of City of McRae, 784 F.2d 1533 (11th Cir. 1986). In Brown, public housing tenants brought an action against the City Housing Authority and the Secretary of Housing and Urban Development for alleged violations of

the United States Housing Act of 1937, 42 USC §1437(a), which limits the rent that can be charged to public housing tenants to a fixed portion of their income. The theories of recovery in Brown were identical to those asserted here: The plaintiffs argued that the local housing authority was liable for violations of the Housing Act under section 1983 and that HUD was liable for failing to monitor properly and to obtain compliance under an implied right of action in the Housing Act. Both claims were dismissed for failure to state a claim and the Eleventh Circuit affirmed the dismissal.

In analyzing the section 1983 claim in Brown, the Eleventh Circuit held that Congress had foreclosed private enforcement of the Housing Act by designating HUD, rather than the tenants themselves, as the enforcer of the Act. Relying on two Fourth Circuit decisions, Wright vs. City of

Roanoke Redevelopment and Housing Authority, 771 F.2d 833 (4th Cir. 1985), cert. granted, 106 S.Ct. 848 (1986), and Phelps vs. Housing Authority, 742 F.2d 816 (4th Cir. 1984), the Eleventh Circuit found support for its conclusion in the following: (1) "The obvious lack of any affirmative statutory language indicating a Congressional intention to allow private remedial suits"; (2) the fact that the Housing Act was "replete with indication of an intention to entrust HUD with the mean s and the responsibility for effective enforcement"' and (3) the fact that HUD regulations promulgated pursuant to the Housing Act created procedures by way of which tenants could air their utility allowance grievances. Brown, 784 F.2d at 1537.

The parallels to this case and to Title IV-D are obvious. First, as the plaintiffs have conceded, Response at 38,

there is no "affirmative statutory language indicating a Congressional intention to allow private remedial suits" in Title IV-D's child support enforcement provisions.

Second, the Housing Act and Title IV-D are equally "replete with indications of an intention to entrust [the federal agency] with the means and the responsibility for effective enforcement": The primary enforcement mechanism to which the court pointed in Brown was the Annual Contributions Contract executed between HUD and each local housing authority which required that the local authorities comply with the Housing Act and HUD regulations. HUD could enforce compliance with the Annual Contributions Contract "by the most drastic possible means: termination of the federal subsidies under the contract." 784 F.2d at 1537. Title IV-D is also enforced with the threat of loss of federal funds.

Under 42 USC § 603(H) the Secretary of HHS is authorized to reduce the amounts otherwise payable to a state by amounts ranging between one and five percent, depending on the number of times a finding of non-compliance has been made.

The fact that the penalty provision does not allow for a complete cut-off of federal funds does not dilute the federal defendant's enforcement role; rather, it strengthens it. As Judge Tuttle pointed out in his dissent from the majority holding in Brown, complete termination of federal funds is such a drastic remedy that it is rarely imposed. Brown, 784 F.2d at 1542. To Judge Tuttle, the availability of a little-used enforcement mechanism did not indicate that Congress had foreclosed private enforcement. By contrast, the enforcement mechanism behind Title IV-D satisfies both the majority and the dissenting opinions in Brown. Financial

penalties are available, but in a form that encourages their use. In fact, Congress recognized the same problems Judge Tuttle identified. In its report on the 1984 Amendments, which included the present penalty provisions, the Senate Finance Committee called the previous penalty -- a flat loss of five percent of AFDC funds -- a "barrier to the full implementation of existing law." S.Rep. No. 387, 98th Cong., 33, reprinted in 1984 U.S. Code Cong. & Admin. News 2397, 2429. The Committee noted that the harshness of the penalty had resulted in its repeated suspension by legislation to avoid penalizing states "which actually had effective programs or which had made strong efforts to remedy the non-compliance." Id. That the purpose of the more flexible penalty structure was to encourage enforcement is made clear by the Finance Committee's closing comments:

> With these changes, the Committee believes that the audit and penalty provisions of the law should become a powerful tool for Federal oversight aimed at increasing the level of effectiveness to the child support enforcement program.

Id.

Third, as in Brown, an individual grievance procedure is available, and has been utilized by plaintiff Wehunt, who has exhausted the administrative review process of the Georgia Department of Human Resources and has appealed the Franklin County Department of Family and Children Services' determination on benefits to the HHS hearing officer and hearing officer for final appeals. Complaint, para. 37. In addition to the administrative procedures, AFDC recipients can bring an action directly against the responsible parent and join the Georgia Department of Human Resources as a party plaintiff. Department of Human Resources vs. Bagley, 240 Ga. 306,

307-308 (1977). If the DHR fails actively to participate in the action, it may lose its claim for reimbursement of AFDC previously paid. Id. Even where the DHR does actively participate in the action, if it is determined that the Department breached its duty to initiate action the recipient's attorney's fees and costs will be deducted from the DHR's reimbursement. Id.

In short, because of the clear parallels to the Eleventh Circuit's decision in Brown, the court must concluded that private enforcement of Title IV-D has been foreclosed because Congress has designated HHS as the enforcer of the Child Support Enforcement Program. Accordingly, there is no need to reach the second question -- whether Title IV-D creates "rights" enforceable within the meaning of section 1983. See Sea Clammers, 453 U.S. at 19.

B. Whether the Plaintiffs Have A Cause of Action against the Federal Defendant under Title IV-D.

The plaintiffs argue that Title IV-D should be interpreted to create an implied right of action against the federal defendant. In addressing "the recurring question whether Congress intended to created a private right of action under a federal statute without saying so explicitly," the Supreme Court has taken the following approach:

> The key to the inquiry is the intent of the Legislature. We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.

Sea Clammers, 453 U.S. at 13; see also Merrill Lynch, Pierce, Fenner & Smith vs. Curran, 456 U.S. 353, 378 (1982). As a means of ascertaining such intent, the Eleventh Circuit analyzes four factors

identified as relevant in earlier Supreme Court decisions. See Brown, 784 F.2d at 1538. The four factors are:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort vs. Ash, 422 U.S. 66, 78 (1975) (original emphasis) (citations omitted).

Applying the four Cort factors, the court concludes, first, that the plaintiffs are among the intended beneficiaries of Title IV-D. This is not to say that the plaintiffs are the only beneficiaries or even the primary beneficiaries. Instead,

in light of the practical results of the Title IV-D program, it seems fair to conclude that the statute has two beneficiaries -- states as direct beneficiaries and AFDC recipients as indirect beneficiaries. Cf. Perry vs. Housing Authority of City of Charleston, 664 F.2d 1210, 1213 (4th Cir. 1981). As the Eleventh Circuit noted in Brown, 784 F.2d at 1538, being among the intended beneficiaries of the statute is sufficient to satisfy the first Cort factor.

Second, both the language and the legislative history of Title IV-D are silent as to congressional intent either to create or to deny a private right of action. That silence does not create a presumption in favor of an implied right of action. Id. at 1539.

As the plaintiffs correctly pointed out, "the state of the law at the time the legislation was enacted" may be an

important indicator of congressional intent on remedies, and any "evaluation of congressional action ... must take into account its contemporary legal context." Merrill Lynch, Pierce, Fenner & Smith vs. Curran, 456 U.S. at 379, quoting Cannon vs. University of Chicago, 441 U.S. 677, 698-699 (1979). The "contemporary legal context" of the legislation at issue here, however, provides no support for the argument that Congress must have intended the courts to imply a private right of action under Title IV-D. The present case is unlike the situation in Curran, where "the federal courts routinely and consistently had recognized an implied private cause of action" under the Commodity Exchange Act. 456 U.S. at 379. Here, prior to the adoption of Title IV-D in 1974, not one federal court had found an implied cause of action against the federal government under any provision of the

Social Security Act. The pre-1974 cases cited by the plaintiffs were brought against state defendants. See, e.g., Goldberg vs. Kelly, 397 U.S. 254 (1970); King vs. Smith, 392 U.S. 309 (1968).

Between 1974 and 1984, when Title IV-D was amended to increase the federal government's role in monitoring the state programs, only two cases were brought against the federal agency under the statute. In Mandley vs. Trainor, 523 F.2d 415 (7th Cir. 1975), a suit challenging Illinois' revised program for emergency assistance to AFDC recipients, jurisdiction against (then) HEW was premised on the mandamus statute, 28 USC § 1361, not on any implied cause of action. Id. at 419 n. 2. In Quarles vs. St. Clair, 711 F.2d 691 (5th Cir. 1983), a suit challenging Mississippi's administration of parts of Titles IV-A and IV-D not at issue here, the basis of jurisdiction against HHS was not

discussed at all. One appellate decision that is, at most, ambiguous on the question of an implied right of action does not create a "contemporary legal context" in which Congress' silence on implied remedies should be taken as approval. Compare Cannon vs. University of Chicago, where Congress incorporated the language of Title VI of the Civil Rights Act of 1964 (which had more than a dozen times been interpreted to allow a private remedy) into Title IX of the Education Amendments of 1972 and "explicitly assumed that it would be interpreted and applied as Title VI had been," 441 U.S. at 696; and Merrill Lynch, Pierce, Fenner & Smith vs. Curran, where congressional amendments to the Commodity Exchange Act left intact the statutory provisions under which "the federal courts routinely and consistently had recognized an implied private cause of action." 456 U.S. at 379.

The third and fourth Cort factors are often treated together, on the rationale that it would "plainly be inconsistent with any legislative scheme in the federal legislation to imply a private cause of action where the legal right invoked is one traditionally left to state law." Brown, 784 F.2d at 1539 quoting Perry, 664 F.2d at 1216. Again on the basis of the Eleventh Circuit's in Brown, the court must conclude that an implied right of action under Title IV-D would be inconsistent with the underlying purposes of the legislative scheme because it would create a cause of action traditionally relegated to state law. In Brown, the court described the plaintiff's challenge to HUD's monitoring as "essentially a rent dispute failing within the area of landlord-tenant relations." 784 F.2d at 1539. The challenge to HHS' monitoring here must necessarily be seen as essentially a

custody dispute falling within the area of family law. The plaintiffs argue that the issue underlying their implied cause of action is not one of family law but of federal law -- i.e., whether the federal defendant has performed the duties established for him by Congress. However, the same argument applies to the issue involved in Brown, where the plaintiffs sought to sue the federal defendant for failure to obtain compliance. The suit here is for the same type of failure. If the issue was not one of federal law in Brown, it is not one of federal law here.

Even if the third factor were to be considered separately, the conclusion would be the same: It would be inconsistent with the underlying purposes of the federal legislative scheme to imply a private remedy for the plaintiffs. If private parties, in individual or class actions, were allowed to challenge the Secretary's

overall administration of the Title IV-D program in a particular state, the courts would be placed in a supervisory position over the Secretary and would be called on to make decisions -- such as what the statute requires in terms of specific reporting and program requirements -- that Congress deliberately delegated to the Secretary. Private suits challenging particular decisions by the Secretary would require the courts to balance a number of opposing interests; i.e., federal agency resources and state resources versus a plaintiff's interest in the $50 disregard and the psychological benefits of paternity determinations, all in the contest of the facts of a particular case. The necessity for similar balancing in the utility allowance context led the Eleventh Circuit in Brown and the Fourth Circuit in Phelps and Wright to conclude that it was "highly unlikely that Congress intended federal

courts 'to make the necessary balancing.'" 784 F.2d at 1537.

The court analysis, in light of Brown, yields the conclusion that Title IV-D does not create an implied private right of action against the federal defendant.

IV. MOTION FOR LEAVE TO AMEND.

Also pending before the court is the plaintiffs' motion for leave to amend their complaint against the federal defendant to clarify that they seek mandamus relief under 28 USC § 1361 and to add a claim for relief under the Administrative Procedure Act, 5 USC §701, et seq. Because the federal defendant has already answered the previous complaint, the plaintiffs may amend only by leave of court, which "shall be freely given when justice so requires." Rule 15(a), Fed. R. Civ. P.

The defendant opposes the motion, arguing that leave to amend should be

denied for repeated failure to cure deficiencies in previous complaints, lack of diligence, and prejudice to the opposing party. However, the cases cited by the defendant in support of his arguments are all quite different from the present case. In Freeman vs. Continental Gin Company, 381 F.2d 459 (5th Cir. 1967), the defendant's motion to amend its counterclaim came eight months after summary judgment had been granted for the plaintiff and "might well have been refused on the ground that it would be futile." Id. at 468. In Murphy vs. White Hen Pantry Company, 691 F.2d 350 (7th Cir. 1982), the plaintiff sought to amend his complaint two years after the action was filed, six weeks before trial, and several months after discovery had been completed, leading the court to conclude that the defendant would have been prejudiced by the amendment. In Union Planters National Leasing, Inc. vs.

Woods, 687 F.2d 117 (5th Cir. 1982), the amendment was sought after discovery had been completed and after a motion for summary judgment had been granted.

In contrast to the above-cited cases, there is little reason not to grant leave to amend in this case. The case is not near trial. The new theory of recovery being advanced differs from the previous theories primarily jurisdictionally; the underlying facts are basically the same as for the previously-asserted theories so that the plaintiff cannot claim lack of notice. Discovery has not yet been completed; the court earlier stated its intention to allow an additional four months for discovery if the pending motions to dismiss were denied and an additional six months for discovery if a class was certified. The plaintiffs contend that any additional discovery necessitated by the amendment will not be substantially

different from the type of discovery already contemplated, and the plaintiffs have not shown otherwise. Finally, Eleventh Circuit precedent makes it clear that dismissal of the plaintiffs' previous complaints "does not automatically terminate the action unless the court holds either that no amendment is possible or that the dismissal of the complaint also constitutes a dismissal of the action." Czerencha vs. International Association of Machinists and Aerospace Workers, 724 F.2d 1552, 1554 (11th Cir. 1984). The dismissal order in this case is contemporaneous with leave to amend.

The court finds that little or no prejudice to the defendants will result from this amendment, and the plaintiffs' motion for leave to amend is therefore GRANTED.

V. MOTION FOR CLASS CERTIFICATION.

In view of the foregoing dismissals of the plaintiffs' previous complaints, the plaintiffs' motion for class certification is DENIED as moot. The motion may be renewed under the amended complaint yet to be filed if the plaintiffs so choose.

VI. CONCLUSION.

The plaintiffs do not have a cause of action against the state defendant under 42 USC §1983 because Congress foreclosed private enforcement of Title IV-D. The plaintiffs do not have a cause of action against the federal defendant under Title IV-D for the same reason: Congress simply did not intend that Title IV-D should be enforced by private action. The defendants' separate motions to dismiss for failure to state a claim pursuant to Fed. R.Civ. P. 12(b)(6) are therefore GRANTED.

Because little or no prejudice to the defendants will result, the plaintiffs' motion for leave to amend their complaint is GRANTED. The plaintiffs shall have ten (10) days from receipt of this order in which to file their third amended complaint containing their mandamus and APA claims against the federal defendant. The defendant shall have fifteen (15) days to answer. Any further Rule 12 motions shall be filed no later than thirty (30) days after the defendant answers or should answer the amended complaint. The plaintiffs' response to any such motions will be due no later than thirty (30) days thereafter.

The plaintiffs' motion for class certification is DENIED as moot. The court's previously-issued stay of discovery remains in effect pending the resolution of any Rule 12 motion.

Finally, the parties are reminded that this court's Case Instructions limit briefs to twenty-five (25) pages, double-spaced, unless leave to exceed is obtained in advance. Any brief in excess of fifteen (15) pages shall be indexed. Non-complying briefs will not be considered.

SO ORDERED, this 30th day of September, 1986.

/S/
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOY D. HUNT, et al.	)	
	)	C85-2891A
v.	)	
	)	J. OWEN FORRESTER
JAMES G. LEDBETTER, et al.	)	
	)	

[X] **Decision by Court.** This action came for consideration and hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered, granting defendants' motion to dismiss.

IT IS ORDERED AND ADJUDGED

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that the plaintiffs take nothing, that the action be dismissed, and that the defendants, JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources, and

OTIS OWEN, recover from the plaintiff, JOY D. WEHUNT, and plaintiff/intervenors, BRENDA WHITE AND GWENDOLYN BROWN, their costs of action.

FILED AND ENTERED IN CLERK'S OFFICE
March 11, 1987
Luther D. Thomas, Clerk

BY: /S/
Janice C. Murray, Deputy Clerk

CLERK: Luther D. Thomas

DATE: March 11, 1987

CLERK

Luther D. Thomas

BY DEPUTY CLERK:

DATE

March 11, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOY D. WEHUNT LEWALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. C85-2891A
vs.	)	
JAMES G. LEDBETTER, et al.,	)	
Defendants.	)	

ORDER

This action is before the court on the federal defendant's motion to dismiss the plaintiffs' third amended complaint for failure to state a claim upon which relief can be granted, the plaintiffs' motion to vacate and set aside the court's previous order of dismissal as to the state defendant, the plaintiffs' motion for class certification, and the plaintiffs' motion for Rule 54(b) certification. The background and procedural history of the

case are by now familiar to all involved and require only brief recounting here. The plaintiffs filed this action against the Commissioner of the Georgia Department of Human Resources (the state defendant) and the Secretary of the United States Department of Health and Human Services (the federal defendant) seeking declaratory and injunctive relief for violations of their civil rights under Title IV-A and Title IV-D of the Social Security Act, 42 USC §§ 601, et seq. and § 651, et seq. All of the plaintiffs' Title IV-D claims were dismissed by this court's order filed October 1, 1986, which held that the plaintiffs did not have a cause of action against the state defendant under 42 USC § 1983 because Congress foreclosed private enforcement or Title IV-D and that the plaintiffs did not have a cause of action against the federal defendant because Congress did not intend that Title IV-D

should be enforced by private action. The plaintiffs' Title IV-A claims were later resolved under a consent order entered January 20, 1987. At the same time that it dismissed the plaintiffs' Title IV-D claims, the court permitted the plaintiffs to file a third amended complaint stating claims under the mandamus statute and the Administrative Procedure Act. As a result, only the mandamus and APA claims remain in the case, and those claims are the object of the federal defendant's present motion to dismiss.

In simplified form, the plaintiffs contend that the federal defendant has failed to do three things. First, the defendant "has failed to promulgate adequate regulations, concerning, inter alia, (a) minimum performance standards regarding the location of absent parents, establishment of paternity, and collection of child support to assure that such

programs are effective, and (b) minimum organizational and staffing requirements for state child support recovery programs." Complaint, para. 50. Second, the defendant has failed to monitor adequately the state program. Complaint, para. 51. Third, the defendant has failed to sanction the state for non-compliance with the requirements of Title IV-D. According to the plaintiffs, due to the federal defendant's failures, the State of Georgia operates an inadequate and ineffective program for the establishment of paternity or enforcement of child support. Due to the inadequacies of the state program, the plaintiffs have lost their opportunity to receive regular child support payments and have lost their opportunity to receive, while participating in the AFDC program, the first $50 in monthly support paid by the absent parents of their children. Complaint, para. 60. The plaintiffs therefore seek mandamus and

injunctive relief requiring the federal defendant to rectify his failures, which will in turn result in the state's operation or a program that complies with Title IV-D.

I. MOTION TO DISMISS.

The defendant's primary argument in support of his motion to dismiss the complaint is that the plaintiffs have no standing to assert their Administrative Procedure Act and mandamus claims. To satisfy the minimum requirements of Article III's "case or controversy" provision, the plaintiffs must "establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm." Warth v. Seldin, 422 U.S. 490, 505 (1975). As the Court of Appeals for the D.C. Circuit has said:

> At its "irreducible minimum," the Article III standing requirement

> demands that a plaintiff properly allege (1) an "injury in fact" to his own interest that (2) is "fairly traceable" to the defendant's conduct, and that (3) is sufficiently likely to be redressed in a tangible way by available judicial relief.

Common Cause v. Department of Energy, 702 F.2d 245, 250 (D.C. Cir. 1983) (footnotes omitted).[1]

The court agrees with the defendant that the plaintiffs' complaint fails to set out facts sufficient to establish either causation or redressability. Comparison with other cases exploring the same issue

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[1] Claimants under the Administrative Procedure Act must go further and establish that "the alleged injury was to an interest 'arguably within the zone of interest to be protected or regulated' by the statutes that the agencies were claimed to have violated." Sierra Club v. Morton, 405 U.S. 727, 733 (1972). As in Common Cause, 702 F.2d at 250 n. 35, however, that additional non-constitutional "prudential" requirement need not be considered in light of the court's conclusion with regard to the constitutional requirements.

demonstrates the plaintiffs' lack of standing in the present case. In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1975), the complaint alleged that an IRS policy on tax treatment "encouraged" hospitals not to treat indigents and that the plaintiffs had been injured by certain hospitals' denial of treatment due to their indigency. The plaintiffs sought to have the offending policy invalidated and replaced with a policy discouraging the denial of services to indigents. The Supreme Court held that the complaint should have been dismissed because the plaintiffs lacked standing. The Court described as "purely speculative" the plaintiffs' argument that the denial of hospital treatment in fact resulted from the IRS policy or that a court ordered change in the policy would result in the plaintiffs'

In Warth v. Seldin, 422 U.S. 490, the complaint alleged that a town's zoning ordinance limiting housing developments to single family homes operated to exclude persons of low and moderate income because the houses built pursuant to the ordinance were not within the plaintiffs' price range. The plaintiffs therefore sought an injunction requiring a new ordinance. The court held that, in order to satisfy standing requirements, the plaintiffs were required to "allege facts from which it reasonably could be inferred that, absent the [defendants'] restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in [the town] and that, if the court affords the relief requested, the asserted inability of [the plaintiffs] will be removed." Id. at 504. The Court found the complaint "devoid of the necessary allegations," Id., and upheld

the district court's dismissal of the complaint.

In Common Cause v. Department of Energy, 702 F.2d 245 (D.C.Cir. 1983), a group of energy consumers sought to require the Department of Energy to develop statutorily mandated energy conservation plans for federal buildings. The court of appeals affirmed the district court's judgment dismissing the complaint because the plaintiff's assumption that judicial relief would reduce government energy consumption was "conjectural at best, and therefore cannot support standing." Id. at 252.

Finally, in Starbuck v. City and County of San Francisco, 556 F2d 450 (9th Cir. 1977) a group of electricity consumers sought an injunction ordering the Federal Secretary of the Interior to sue the city to change its agreement with a utility company. The court held that the

plaintiffs had failed to "show that the remedy they seek would cure the injury of which they complain," id., at 458, because they had made no showing that their rates would decrease if they were successful in their action. In addition, the plaintiffs failed to show the essential causal link between their injury and the Secretary of Interior's alleged inaction. Id. The court therefore affirmed the district court's dismissal of the complaint for failure to state a claim.

The courts' emphasis on redressability is not casual but is rooted in serious constitutional concerns. As the Court of Appeals for the D.C. Circuit stated:

> The "vitality" of the redressability requirement has been "repeatedly reaffirmed." The requirement serves to limit the judicial role to measures that will produce tangible, meaningful results in the real world. By preventing courts from "rummaging aimlessly through the policy decisions of the elected branches in search of defective government action," it acts as an important

> check upon the power of the judiciary in our scheme of coordinate government branches.

Common Cause, 702 F.2d at 254 (footnotes omitted).

The plaintiffs' claim here is based on a four-step "trickle down" theory or causation and redress: The federal defendant's lack of action permitted the state's lack of action, which permitted the absent parents' lack of action, which injures the plaintiffs to the extent of their $50 monthly pass-through. Conversely, an order from this court requiring the federal defendant to perform fully his alleged statutory duties will cause the state to implement an effective Title IV-D program, which will ensure the absent parents' performance of their legal duties, which will redress the plaintiffs' injuries. It is clear from the above discussion of previously decided cases that the plaintiffs' theory is untenable; as did

the plaintiffs in Warth v. Seldin, the plaintiffs here "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [the defendant], acted otherwise, and might improve were the court to afford relief." 422 U.S. at 507. As the Court concluded in Warth:

> [A] plaintiff ... must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the Court's intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied."

Id. at 508 (footnote and citation omitted). Accordingly, the plaintiffs lack standing to assert these claims against the federal defendant; the defendant's motion to dismiss the complaint for failure to state a claim is therefore GRANTED.

II. REMAINING MOTIONS.

Given the court's disposition of the defendant's motion to dismiss the only remaining claims in the case, the plaintiffs' motions for class certification and for Rule 54(b) certified are DENIED as moot.

The plaintiffs also move this court to vacate and set aside its previous order dismissing the claims against the state defendant and the federal defendant. In that order, the court relied heavily on the Eleventh Circuit's panel decision in Brown v. Housing Authority of the City of McRae, Georgia, 784 F.2d 1533 (11th Cir. 1986). The panel decision has since been vacated temporarily while the Eleventh Circuit rehears the case en banc. In addition, the Supreme Court recently reversed the Fourth Circuit's decision in Wright v. City of Roanoke Redevelopment and Housing Authority, 771 F.2d 833 (4th Cir.

1985), on which the Eleventh Circuit panel relied in Brown. See 107 S.Ct. 766 (1987). However, the court is not convinced that the recent decisions or the Eleventh Circuit and the Supreme Court compel a different result than that reached in its earlier order. While it appears that the Supreme Court's decision in Wright may compel a different result in Brown with regard to the Eleventh Circuit panel's analysis of the section 1983 claim, Wright does not necessarily require a different result for the section 1983 claim against the state defendant in this case. Wright and Brown are virtually indistinguishable because they involve the same statute, the Housing Act of 1937, 42 USC § 1437(a). This action, of course, involves a completely different statute. Moreover, the court already has identified features of the Title IV-D program that support its dismissal or the §1983 claim even more

strongly than in Brown. See Order, October 1, 1986 at 10-12.

The plaintiffs also fail to note that the Supreme Court's decision in Wright, 107 S.Ct. 766, did not address at all the implied right of action issue raised by the plaintiff's claims against the federal defendant under Title IV-D. There is therefore no reason to assume that the Eleventh Circuit's result will be any different in Brown on that issue. It would make no sense to proceed with discovery in this case on some or all of the plaintiffs' previously dismissed claims on the speculation that the Eleventh Circuit may change all or some of the result in Brown and that any changes in Brown would require corresponding changes in this court's previous order. Therefore, the plaintiffs' motion to vacate and to set aside this court's previous order is DENIED.

SO ORDERED, this 9th day of March, 1987.

/S/
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

STATUTORY MATERIALS

42 U. S. C. § 602(a)(26)

(a) A state plan for aid and services to needy families with children must ...

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required --

> (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed;
>
> (B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this

paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 606(b)(2) of this title (without regard to clauses (A) through (D) of such section); unless the State agency, after making reasonable efforts, is unable to locate an appropriate individual to whom such payments can be made; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the State's plan for medical assistance under subchapter XIX of this chapter, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; but the State shall not be subject to any financial penalty in the administration or enforcement of this subparagraph as a result of any monitoring, quality control, or auditing requirements;

42 U. S. C. § 602(a)(8)(A)(vi)

(a) A State plan for aid and services to needy families with children must ...

(8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the State agency --

(vi) shall disregard the first $50 of any

child support payments for such month received in that month, and first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due, with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title);....

42 U. S. C. § 602(a)(28)

(a) A State plan for aid and services to needy families with children must ...

(28) provide that, in determining the amount of aid to which an eligible family is entitled, any portion of the amounts collected in any particular month as child support pursuant to a plan approved under part D of this subchapter, and approved under this part as in effect both during July 1975 and during that particular month) would not have caused a reduction in the amount of aid paid to the family if such amounts had been paid directly to the family, shall be added to the amount of aid otherwise payable to such family under the State plan approved under this part;....

42 U. S. C. § 651

For the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be

available under this part to all children (whether or not eligible for aid under part A) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

42 U. S. C. § 657(b)(1)

(b) The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d)) be distributed as follows:

> (1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;....

42 U. S. C. § 657(c)

Whenever a family with respect to which child support enforcement services have been provided pursuant to section 654(4) of this title ceases to receive assistance under part A of this subchapter, the State shall provide appropriate notice to the family and continue to provide such services, and pay any amount of support collected, subject to the same conditions and on the same basis as in the case of the individuals to whom services are furnished

pursuant to section 654(6) of this title, except that no application or other request to continue services shall be required of a family to which this subsection applies, and the provisions of section 654(6)(B) of this title may not be applied.